IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 9TH AUGUST 2007 / 18TH SRAVANA 1929

CMA.No. 90 of 2003()

E.A.NO.728/94 IN E.P.212/92 in O.S.No.258/97 of PRINCIPAL SUB JUDGE, KOZHIKODE & A.S.No.226/1999 of II ADDL. DISTRICT COURT, KOZHIKODE.

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APPELLANT: 1ST RESPONDENT/CLAIM PETITIONER

SAKUNTHALA W/O. THEKKAYIL RAJARATNAM
VAIDYER, RESIDING AT VALAYANAD AMSOM, DESOM,
KOMMERI DESOM, KOZHIKODE TALUK

BY ADV. SRI.K.P.DANDAPANI

RESPONDENTS: APPELLANT & 2ND RESPONDENT/PLAINTIFF & DEFENDANT

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1. M/S. STALIN TRADERS GENERAL MERCHANTS,
2 WEST CAR STREET, VIRUTHNAGAR,MADRAS STATE,
REPRESENTED BY ITS PARTNER, SELVARAJAN.

* 2. M/S. SHEENA TRADERS, CHEROOTTY ROAD,
KOZHIKODE.

(NAME OF R2 IS DELETED FROM THE ARRAY OF PARTIES
AT THE RISK OF APPELLANT VIDE ORDER DT. 11.6.2007 IN
I.A.No.1890/2007)

BY ADV. SRI.THOMAS CHAZHUKKARAN

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 09/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

C.M.A.No.90 of 2003

Dated this the 9th August, 2007.

J U D G M E N T

A stranger to O.S.No.258/1987, on the file of the Sub Court, Kozhikode, is the appellant. The first respondent filed a suit against the second respondent for money. In that suit, first respondent filed I.A.No.3487/87 for an order of attachment before judgment of the petition scheduled property. Though initially an attachment was passed, the appellant filed a petition, I.A.No.1939/91, for lifting the attachment. The Trial court allowed the application and raised the attachment. Subsequently, the suit itself was decreed. The first respondent filed E.P.No.212/1992 against the judgment debtor and sought attachment of petition scheduled properties again for realisation of decree debt. The Executing Court ordered attachment. The appellant filed E.A.No.728/1994 for lifting the attachment. The Executing court allowed that application, and found that the second respondent, judgment debtor has got no saleable interest over the property, on the date of attachment. Challenging that order, first respondent filed A.S.No.226/1999 before the II Additional District Court, Kozhikode.Before the learned District Judge, a submission was

made to the effect that since the appellant was doing a business at Madras, he could not take out a Commission to find out the market value of the property. Based on that submission alone, the lower appellate court set aside the Order passed by the Executing Court, and remanded the matter. Challenging that order of remand, this C.M.A. is filed.

2. Though at the time of admission of the appeal, no substantial questions of law were raised, the following substantial questions of law were framed later on.

> 1. Whether the order of remand passed by the lower appellate court setting aside the decree and judgment passed by the Trial Court and remanding the case, on an oral submission made by the counsel appearing for the appellant, that as he was residing far away from the Court, he was unable to adduce evidence is legal in a particular piece of evidence.
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> 2. Whether the order passed by the Trial Court can be set aside and case remanded for the purpose of filling up the lacunae in the evidence.

3. The material on record shows that first respondent issued a notice demanding some amount on 6.7.1987 to the second respondent. The appellant purchased properties on 11.9.1987. The suit was filed thereafter. It was decreed on 24.1.1991. The learned counsel appearing for the appellant submits that though first respondent had raised a contention that appellant and judgment debtor are closely related, and there was collusion. There is absolutely no evidence adduced to substantiate that argument. It is argued that the fact that even accepting the contention of the first respondent that he issued a notice demanding repayment of the amount on 6.7.1987 to the second respondent, without accepting the contention that the second respondent had noticed, that does not mean that the appellant had also notice of the transaction. It is argued that the lower appellate court failed to note that when the properties were attached before the judgment, the appellant filed a petition for raising that attachment, and the Trial Court lifted that attachment. The lower appellate court took a view that in this particular case, the decree holder is assailing the sale under Section 53 of the Transfer of Property Act. It was contented that the appellant was not a bona fide purchaser and to his knowledge, attachment effected before judgment was never raised. It was also contented that on the date of attachment, the

property with building would fetch more than Rupees Fifteen Lakhs, but as per the sale deed, the appellant purchased the property for a consideration of Rs. 34,850/=, and the balance amount shown as sale consideration itself would show that it is a shamp transaction. On the side of the appellant, her husband was examined as PW.1. Exts. A1 to A17 were proved and marked. The respondent did not adduce any evidence. Executing Court found that the property is not liable to be attached.

4. Though the respondent has raised a contention that the appellant is a close relative of the judgment debtor, there is absolutely no evidence adduced to prove that effect. During cross examination of PW.1, no suggestion was put to him to the effect that appellant and judgment debtor are close relatives or colluding each other. On the other hand, all that was suggested was that appellant in collision with the judgment debtor fabricated the document and the value of the property on that date will be more than Rupees Fifteen Lakhs. The evidence on record shows that after taking Ext.A1 assignment deed, the appellant purchased another one cent, which according to her, was for forming a road for access to the property. To counter the contention that the value shown is meagre, appellant

produced Exts.A8 & A9 to show that other properties in the locality was also sold, more or less, for the same price. Ext.A6 order shows that during the pendency of the suit, there was an attachment of the very same property under Order XXXVIII Rule 5 of the Civil Procedure Code, and the appellant filed claim petition as I.A.No.1939/1991, and attachment was lifted. The effect of that order was not considered by the lower appellate court . The lower appellate court did not consider the evidentiary value of any of the materials produced by the appellant before the Executing Court. Merely based on a submission made by the advocate appearing for the decree holder that the decree holder is a business man at Chennai, the lower appellate court set aside the order passed by the Executing Court and remanded the matter. The lower appellate court also held that since the sale deed was executed after the receipt of the lawyer's notice, that is a prima facie evidence to hold that the sale was effected to defeat the creditor. As already stated, dates alone are not material. The Court will have to assess the entire evidence. A reading of the Order passed by the lower appellate court itself would show that without considering any points raising for consideration, the appellate court set aside the order and remanded the matter. It is a trite law that party cannot be allowed to fill up the lacunae by giving an opportunity. So I have no other option, but to

set aside the Order of remand passed by the lower appellate court, and direct the lower appellate court to reconsider the appeal on merits and dispose of the same afresh, in accordance with law.

5. In the result, the appeal is allowed. The Order passed by the lower appellate court in A.S.No.226/1999 is hereby set aside. The lower appellate court is directed to take A.S.No.226/1999 back to file, and dispose of the same afresh, in accordance with law, after hearing both sides.

The parties shall appear before the lower appellate court on 28.9.2007.

C.M.P.No.2067/2003 in C.M.A.No.90/2003 is dismissed.

K.PADMANABHAN NAIR,
JUDGE

nj.

K.PADMANABHAN NAIR, J.

C.M.A.No.90 of 2003

J U D G M E N T

Dated:9th August, 2007.